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LWG
LOWER WILLAMETTE GROUP

Chairperson: Bob Wyatt, NW Natural
Treasurer: Fred Wolf, Legacy Site Services for Arkema

Via Electronic Mail

August 9, 2013

Richard Albright
United States Environmental Protection Agency, Region 10
Office of Environmental Cleanup, Mail Code ECL-115
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

Re: Lower Willamette Group Reply in Support of Objection to EPA's Notice of Demand for Payment of Stipulated Penalties Regarding Baseline Human Health Risk Assessment and Request for Determination; Lower Willamette River, Portland Harbor Superfund Site, USEPA Docket No: CERCLA-10-2001-0240

Dear Director Albright:

Last week, the United States fined Halliburton Energy Services $200,000 for destroying evidence related to the 2010 Deepwater Horizon disaster.[1]

The Lower Willamette Group used the word "generally" in a sentence in the May 2011 draft final BHHRA.[2] It deleted the phrase "every day of every year" in four places as instructed by EPA, but failed to catch it in a fifth.[3]

In its August 2, 2013 Response, EPA asserts that these and similar editorial issues justify a $125,000 penalty because the Consent Order gives it the "right" to assess penalties when a document is of unacceptable quality. In fact, EPA implies the LWG is fortunate because the penalties would have been much higher but for EPA's alleged generous exercise of discretion in waiving a substantial amount of accrued penalties.

The LWG disagrees that EPA has the legal authority to assess monetary penalties indefinitely on the basis of "deficiencies" that it not only did not convey to the LWG but also, by its own admission, could not define for more than a year. But even if EPA had such unlimited authority, it would be a mistake for EPA to exercise it in this manner. All EPA is accomplishing

[1] http://www.nytimes.com/2013/07/26/business/halliburton-pleads-guilty-to-destroying-evidence-after-gulf-spill.html
[2] Noncompliance list, attached as Exhibit 3 to LWG's July 12, 2013 Objections, Item 7.
[3] *Id.*, Item 17.

through this penalty is a clear communication that parties who refuse to cooperate with the government are better off than those who try to do the right thing.

EPA does not refute the facts underlying this dispute as detailed in the LWG's July 12, 2013 Objections. EPA provides no support for the finding in Director Opalski's December 2012 decision that the deficiencies taken as a whole pointed to a tendency to downplay risk or overemphasize conservativeness. Based on this record, even if EPA had unlimited authority to assess stipulated penalties, the exercise of it here was arbitrary and capricious and a violation of due process.

Indeed, this penalty is not being used as a tool to encourage compliance[4] but as a hammer to force cooperating parties to accept EPA's revisions wholesale, even when they contain errors. EPA admits as much in its response when it states that it sent the June 22 notice of noncompliance because the only way to "remedy noncompliance" was "to correct the BHHRA consistent with EPA's modifications and last remaining comments."[5] EPA's clear message is that parties who sign consent orders or decrees that include stipulated penalty provisions are at much greater risk when they legitimately push back against EPA. EPA is creating a significant disincentive for parties to cooperate with EPA in remedy implementation at Portland Harbor.

The stipulated penalties should be withdrawn.

1. **EPA must articulate a rational basis for the assessment of a monetary penalty.**

When the government seeks to recover penalties for a continuing violation, its order or direction must be "sufficiently clear" to place the responding parties on notice of the prohibited conduct.[6] "The question of proper notice, as in cases of statutory construction, depends on whether the order itself is so vague 'that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . .'"[7] In the absence of proper notice, "it would seem unreasonable to permit the [government] to knowingly let daily penalties accrue without giving notice of the [government's] position at the earliest reasonable time."[8] EPA's stipulated penalty guidance makes this same point:

> The government encounters significant difficulty collecting stipulated penalties if it sits on its rights. Delay allows penalties to increase to levels parties may argue are inequitable. Sources may also raise equitable defenses such as laches or estoppel, arguing that the government cannot fail to exercise its rights for

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[4] EPA Response at 1, Ex. 2.
[5] *Id.* at 5.
[6] *United States v. Beatrice Foods,* 493 F.2d 1259, 1269 (8th Cir. 1974), quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).
[7] *Id.*
[8] *Id.* at 1267.

> extended periods of time allowing stipulated penalties to continue to accrue and then move to collect unreasonably high penalties.[9]

Here, EPA argues that it "could have assessed penalties beginning on May 2, 2011, the date the unacceptable document was received by EPA,"[10] even though EPA "did not know all of the modifications [it] would make nor all of [its] comments or how much time it would take" until June 22, 2012.[11] EPA's admission that for more than a year even it was unclear as to what its comments on the BHHRA required makes it abundantly clear that the LWG was not provided the notice required by due process.

Indeed, EPA's acknowledgement that it was unwilling or unable to tell the LWG which of those comments or modifications constituted violations of the Consent Order until July 27, 2012 – three days after the deadline "the LWG was given . . . to decide if they would proceed to finalize the BHHRA in accordance with EPA's modifications and comments, or if they wished to begin the dispute resolution process"[12] – highlights that EPA's motivation in serving the June 22 notice of noncompliance was not to enforce its 2009 comments on the draft BHHRA but rather to coerce the LWG into accepting the 99.9 percent of EPA's June 2012 revisions that were either inconsistent with prior agreements between EPA and the LWG on the content of the BHHRA or entirely new changes not previously identified by EPA. EPA's subsequent assessment of penalties in an amount that exceeds all but a handful of penalties issued by Region 10 in recent years for actual environmental damage (and is nearly two-thirds the amount of the fine issued against Halliburton last week for conduct related to the worst environmental disaster in the United States' history) is plainly intended to punish the LWG for asserting its right to seek dispute resolution on significant technical issues in the BHHRA that were unrelated to the minor editorial issues that served as the basis for the notice of noncompliance. This kind of selective enforcement action for reasons unrelated to the alleged infractions committed by the LWG is arbitrary and capricious and violates the LWG respondents' rights to due process.[13]

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[9] *Use of Stipulated Penalties in EPA Settlement Agreements* (EPA, 1990), p. 5.

[10] EPA Response at 3. EPA states that the end date for accrual was February 11, 2013, the date the LWG submitted the final BHHRA following dispute resolution, which would have been a period of 652 days of noncompliance. Under EPA's reading of the Consent Order, it could have fined the LWG $3,060,500 if it were dissatisfied with a single word. Although we agree with EPA that you need not decide here whether the Consent Order caps the accrual of stipulated penalties at 90 days, the 90 day limitation in § XIX.4 of the Consent Order is relevant to EPA's claim that it has significantly discounted the amount of penalties it could have assessed. The LWG notes that EPA Guidance specifically recommends such limitations (coupled with the reservation of EPA rights to seek statutory penalties found in §XXI.2 of the Consent Order) in order to avoid due process or equitable concerns where delay by EPA results in the accrual of unreasonably high stipulated penalties. *Use of Stipulated Penalties in EPA Settlement Agreements* (EPA, 1990), p. 6.

[11] EPA Response at 6.

[12] *Id.* at 5.

[13] *See, e.g., Armendariz v. Penman,* 75 F.3d 1311, 1326 (9th Cir. 1996), *abrogation in part on other grounds recognized by Crown Point Development v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007) (City official's selective enforcement of housing codes to deflate the value of the plaintiffs' buildings, purchase them, and replace

EPA objects to the LWG's comparison of the amount of penalty assessed for the LWG's alleged failure to address a few editorial comments to penalties assessed by EPA in cases of actual environmental harm or risk to public health as irrelevant to "the case-specific facts and circumstances of this case."[14] Yet EPA makes no effort to explain how it arrived at a 45 day penalty period, as opposed to 7 days, or 70, noting only that August 6, 2012, the 45th day, was "during the informal dispute process" and concluding that EPA has discretion.[15] This failure to articulate a "rational connection between the facts found and the choice made" is the very definition of "arbitrary."[16]

Similarly, on a project of this complexity and magnitude, it is an unreasonable and arbitrary exercise of agency authority to offer as the only support for an enforcement action moving targets of self-serving facts and arguments, including (but not limited to): (1) EPA implies in its Response[17] that the LWG was aware that EPA could have started accruing penalties when it asked for a word version of the BHHRA in July 2011. No such notice was provided to the LWG at that time. Instead, EPA assured the LWG that it agreed with the LWG's "numerical calculations and technical findings" but that it wanted to expedite the process by making its revisions in redline.[18] (2) After the LWG challenged the deficiencies described in EPA's June 22, 2012 letter, EPA substituted a completely new set of marginal deficiencies.[19] (3) EPA's June 29, 2012 letter stated that penalties started accruing as of June 22, 2012. Now, for the first time, EPA asserts it could have imposed stipulated penalties starting in May 2011.[20] (4) EPA also asserts for the first time that the LWG was solely responsible for the delay between May 2011 and February 2013 in providing a compliant BHHRA.[21]

This last example is EPA's only attempt to tie the amount of the penalty to the Portland Harbor RI/FS in order to argue that the penalty is justified. EPA states that:

> the deficient second draft BHHRA did cause harm, as there was delay in completion of the RI/FS. The second draft was submitted in May 2011 and was not corrected until February 2013, which was a delay of almost two years. The significant amount of time and resources EPA expended during that time to modify the BHHRA and have it

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them with a shopping center would violate equal protection); *A.D. v. California Highway Patrol*, 712 F.3d 446 (9th Cir. 2013) (officer who used force against a suspect to "teach him a lesson" or "get even" would violate due process "even though [the officer was] ultimately effectuating an arrest").

[14] EPA Response at 7.

[15] *Id.* at 3.

[16] *Natural Resources Defense Council v. EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992)

[17] EPA Response at 3, 5-6.

[18] July 22, 2011 email from EPA and July 29, 2011 response from the LWG, attached as Exhibit 13.

[19] LWG's July 12, 2013 Objections at 4-5.

[20] EPA Response at 3.

[21] *Id.* at 6. *Compare* EPA's July 22, 2011 email (Ex. 13), which states that EPA's request for a word version of the BHHRA "should not hinder progress on the draft FS."

finalized took time away from reviewing and finalizing the remainder of the RI and FS Reports.[22]

This argument ignores the fact that EPA ultimately identified just 13 minor editorial comments that supposedly failed to address the 2009 comments, resulting in five actual edits to the text.[23] Less than one percent of EPA's revisions to the draft final BHHRA were related to these alleged violations. Further, despite having wrapped up its revisions to the BHHRA in June 2012, EPA is, 14 months later, about half of the way through its review of the October 2011 draft final Remedial Investigation Report and approximately five months behind schedule in delivering its comments on the March 2012 draft Feasibility Study. Five text edits to the BHHRA did not cause the delays in the Portland Harbor RI/FS schedule.

2. **The LWG respondents did not waive their right to due process by executing the consent order.**

Finally, EPA argues that the LWG put itself in this position by agreeing to a Consent Order that provided for the assessment of stipulated penalties. However, the LWG respondents did not waive their rights to challenge the assessment of arbitrary stipulated penalties on due process or other grounds. Indeed, the Consent Order expressly reserves those rights.[24]

EPA's view that the assessment of stipulated penalties under a consent order is simply a math question subject to EPA's unfettered discretion is patently inconsistent with EPA guidance. EPA policy "prefers to achieve PRP-lead cleanups through settlements."[25] EPA guidance stresses the "potential benefits" to parties who settle as opposed to parties who force EPA to take enforcement action.[26] At Portland Harbor, however, despite the issuance of 147 general notice letters, EPA has taken enforcement action against only the 10 parties who signed the Consent Order and who have (with four other cooperating parties) spent more than $100 million trying to complete the RI/FS. EPA's August 2 Response does not address the LWG's concern that EPA's action here communicates a significant disincentive for parties to cooperate with EPA in remedy implementation at Portland Harbor.

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[22] EPA Response at 6.
[23] We note the irony of EPA's dismissal of its original communication to the LWG that 12 of these 13 editorial comments were "non-directed" as "mere semantics." EPA Response at 8.
[24] Consent Order §§XXI.3, XIX.7. "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective, it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart v. Janis* 384 U.S. 1, 4, 86 S.Ct. 1245, 1247 (1966) (citations omitted).
[25] *Enforcement First for Remedial Action at Superfund Sites* at 1 (OECA, OSWER September 20, 2002).
[26] *See, e.g., Enforcement First at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation/Feasibility Studies (RI/FS)* (OSWER 9355.2-21, August 9, 2005).

The LWG continues to stand behind the RI/FS work it has completed at Portland Harbor.[27] EPA itself has previously acknowledged that its complaints about the BHHRA that triggered the assessment of stipulated penalties lacked "technical or factual substance" and did not "change the calculations or analysis that made up the majority of the work and effort doing the risk assessment."[28] The LWG asks that you not allow the cooperative cleanup of Portland Harbor to be derailed in favor of a demonstration of EPA enforcement power over "words . . . moved to other locations."[29]

Conclusion

For all of the reasons discussed in this letter and the LWG's July 12, 2013 Objections, EPA's April 10, 2013 stipulated penalty assessment against the LWG should be withdrawn because it is arbitrary and capricious and in violation of due process. Moreover, the penalty assessment not only is inconsistent with the Consent Order, with EPA guidance and prior practice and with law but also sends the damaging message that non-cooperating parties are in a better position than those who try to do the right thing. No environmental harm, risk to public health, or delay in completion of the RI/FS resulted from the minor semantic disagreements on which EPA bases the penalty. In such circumstances, the penalty appears retaliatory and will discourage potentially responsible parties from cooperating with EPA at Portland Harbor.

Sincerely,

The Lower Willamette Group

Enclosure: Exhibit 13

cc: Lori Cohen, Associate Director, Office of Environmental Cleanup, US EPA Region 10
Lori Cora, Assistant Regional Counsel, US EPA Region 10
Chip Humphrey, Project Coordinator, US EPA Region 10
Kristine Koch, Project Coordinator, US EPA Region 10

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[27] The LWG notes with dismay EPA's suggestion that this penalty is somehow justified by a "lack of cooperation by the LWG" over "the past ten years." EPA Response at 7. This suggestion is news to us and contrary to EPA's other dealings with the LWG. As recently as May 2013, EPA requested that the LWG participate in a collaborative presentation of the status of the RI/FS to Oregon elected officials. It is difficult to imagine EPA wanting to associate itself in that sort of forum with a non-cooperative PRP group that EPA believes has been in a state of continuous violation for a decade. Rather, the invitation from EPA to participate in this presentation was consistent with EPA's April 3, 2013 letter that states "EPA appreciates the LWG's significant efforts and collaboration. . . ."

[28] EPA's October 12, 2012, submission to Director Dan Opalski, at 3, attached as Exhibit 1 to LWG's July 12, 2013 Objections.

[29] *Id.*

EXHIBIT 13

From: Chip Humphrey <Humphrey.Chip@epamail.epa.gov>
Sent: Friday, July 22, 2011 10:14 AM
To: Bob Wyatt; jim.mckenna@verdantllc.com
Cc: Kristine Koch; Jennifer Woronets; Cora.lori@epa.gov; Elizabeth Allen
Subject: EPA request for human

Follow Up Flag: Follow up
Due By: Friday, July 22, 2011 12:30 PM
Flag Status: Flagged

Bob and Jim,

This is to follow up on EPA's July 21, 2011 letter requesting copies of files used to develop the draft Baseline Human Health Risk Assessment (BHHRA). As noted in the letter, EPA agrees with numerical calculations and technical findings of the document. Thus EPA believes that this request should not hinder progress on the draft FS. We understand their is some confusion about the intent of EPA's request and the implications of EPA modifying the document and we are providing clarification in this email..

It is not EPA's intent to take over the risk assessment from the LWG.
EPA believes that there are changes needed to some of the language and presentations in the document, and it will be most efficient for EPA to mark up the document with those specific changes rather than provide additional comments that would then lead to further back and forth (comment & revision cycles) between EPA and LWG.. The intent is to expedite the process by providing an approvable red-lined document that the LWG could then finalize.

Please let us know if you have any questions.

Chip Humphrey
EPA RPM

Kristine Koch
EPA RPM

From: Jennifer Woronets <jworonets@anchorqea.com>
Sent: Friday, July 29, 2011 2:12 PM
To: Chip Humphrey; Kristine Koch
Cc: Jennifer Woronets; Laura Kennedy; Cindy Ryals; James McKenna; Patty Dost; Bob Wyatt; Keith Pine
Subject: Word Version of Text of Draft Baseline Human Health Risk Assessment (BHHRA)
Attachments: 2011_07_29_Draft_RI_Report_Appendix_F-BHHRA_Main_Text.doc; 2011_07_29_Draft RI Report Appendix F-BHHRA_AttachF2_Text.doc; 2011_07_29_Draft RI Report Appendix F-BHHRA_AttachF3_Text.doc; 2011_07_29_Draft RI Report Appendix F-BHHRA_AttachF6 _Text.doc

Chip and Kristine,

Per your letter dated July 21, 2011, follow up email on July 22 and subsequent conversations we've had with you over the telephone, LWG is providing to EPA the Word version of the text of the draft Baseline Human Health Risk Assessment (BHHRA). We are providing this draft document to EPA in order to facilitate your comment process on the document. We understand that you will be making your changes in "redline" and providing those changes to LWG. We further understand that this "redline" process will replace the traditional EPA comment process on a line reference basis, and that LWG will be responsible for finalizing the BHHRA, using the regular LWG/EPA process for resolving comments.

Finally, through providing this Word version of the text, we seek EPA's concurrence that any directives in EPA's July 21, 2011 letter, July 22 email and follow up conversations have been met.

Please let us know if your understanding is different.

Thank you,
Jen Woronets ☺
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